

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 12

AMERICAN SALES & MANAGEMENT  
ORGANIZATION, LLC d/b/a EULEN AMERICA

Respondent,

and

NLRB CASE NO.: 12-CA-163435

SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL 32BJ,

Charging Party.

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**RESPONDENT'S AMENDED BRIEF IN SUPPORT OF EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED ORDER**

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## TABLE OF CONTENTS

	<u>Page(s)</u>
<b>TABLE OF AUTHORITIES.....</b>	<b>iii, iv</b>
<b>STATEMENT OF THE CASE.....</b>	<b>1</b>
<b>I. The Cause of Action and Procedural Posture.....</b>	<b>1</b>
<b>II. The Relationship Between Airline Carriers and Eulen America.....</b>	<b>2</b>
<b>ISSUE.....</b>	<b>3</b>
<b>ARGUMENT.....</b>	<b>3</b>
<b>I. Eulen America Meets the NMB’s Traditional Function and Control Test and is Therefore Subject to the Exclusive Jurisdiction of the RLA.....</b>	<b>3</b>
1. <u>Exceptions # 1, 36-57</u> <u>The ALJ Erred Because he Employed the New Approach to Determine Carrier Control and Erroneously Ignored the Traditional Function and Control Test.....</u>	<b>3</b>
2. <u>Carriers at the FLL Station Exercise Direct and Indirect Control Over Eulen America Sufficient to Support RLA Jurisdiction.....</u>	<b>7</b>
i. Exceptions # 1, 5-7, 20-21, 31, 35-39, 40-41, 43-44, 46-48, 53-63 <i>Carrier Contracts Set the Services to be Provided, Set Compliance Measures with Carrier Performance Standards, Policies, Procedures, and Manuals, Permits Carrier Auditing of Eulen America Operations, and Even Sets Overtime/Holiday Rates.....</i>	<b>7</b>
ii. Exceptions # 1, 22-32, 36-38, 46-50, 53-60, 62, 63 <i>Carrier Training.....</i>	<b>13</b>
iii. Exceptions # 1, 33, 36-38, 41, 46-48, 52-58, 61, 63 <i>Held Out to The Public as Carrier Employees/Representatives and Uniforms.....</i>	<b>20</b>
iv. Exceptions # 1, 34, 36-38, 41, 46-48, 51, 53-57, 60, 62-63 <i>Supplies, Office Space, and Equipment.....</i>	<b>22</b>
v. Exceptions # 1, 8-9, 12-19, 36-39, 41-48, 53-57, 62-63 <i>Hiring, Promotion, Discipline, Firing and Reassignment.....</i>	<b>24</b>
vi. Exceptions # 1, 5, 7, 14, 36-38, 40-41, 44, 46-48, 53-57, 59-60, 62-63 <i>Carrier Influence on Scheduling and Staffing Requirements.....</i>	<b>29</b>

<b>CONCLUSION.....</b>	<b>34</b>
<b>CERTIFICATE OF SERVICE.....</b>	<b>34</b>

## **TABLE OF AUTHORITIES**

### **Page(s)**

#### **FEDERAL COURT CASES**

<i>ABM Onsite Services-West, Inc. v. National Labor Relations Board</i> , 849 F.3d 1137 (D.C. Cir. 2017).....	3, 4, 5, 6, 14, 21, 24
<i>Verrett v. SABRE Grp., Inc.</i> , 70 F. Supp. 2d 1277 (N.D. Okla. 1999).....	3

#### **NATIONAL LABOR RELATIONS BOARD CASES**

<i>Allied Aviation Services Co. New Jersey</i> , 362 NLRB No. 173 (2015).....	6
<i>Bradley Pacific Aviation, Inc.</i> , 350 NLRB 583 (2007).....	9, 10, 14, 22, 29
<i>Globe Aviation Services</i> , 339 NLRB 869 (2003).....	16
<i>Ogden Ground Services</i> , 339 NLRB 869 (2003).....	14, 22
<i>Oxford Electronics d/b/a Oxford Airport Technical Services</i> , Case No. 13-CA-115933 (Feb. 23, 2018).....	1, 4
<i>United Parcel Serv., Inc.</i> , 318 NLRB 778 (1995).....	4

#### **NATIONAL MEDIATION BOARD CASES**

<i>ABM-Onsite Services</i> , 45 NMB 27 (2018).....	5, 6, 7, 8, 10, 12, 21, 24, 25, 27, 29, 32, 33
<i>Airway Cleaners, LLC</i> , 41 NMB 262 (2014).....	6, 7
<i>Air Serv. Corp.</i> , 33 NMB 272 (2006).....	4, 7, 10, 12, 22
<i>Bhd. Ry. Carmen of the U.S. &amp; Can.</i> , 8 NMB 58 (1995).....	4
<i>Command Security Corp. d/b/a Aviation Safeguard</i> , 27 NMB 581 (2000).....	21
<i>Dobbs Int’l Services d/b/a Gate Gourmet</i> , 34 NMB 97 (2007).....	29
<i>Integrated Airlines Services, Inc.</i> , 29 NMB 196 (2002).....	9
<i>International Total Servs.</i> , 26 NMB 72 (1998).....	27
<i>Kannon Serv. Enterprise Corp.</i> , 31 NMB 409 (2004).....	13, 22

<i>Menzies Aviation, Inc.</i> , 42 NMB 1 (2014).....	6
<i>Quality Aircraft Servs.</i> , 24 NMB 286 (1997).....	28
<i>Signature Flight Support</i> , 32 NMB 214 (2005).....	22
<i>Swissport USA, Inc.</i> , 35 NMB 190 (2008).....	7, 14, 21, 22, 27, 29
<i>Worldwide Flight Services., Inc.</i> , 31 NMB 386 (2004).....	13
<b>FEDERAL STATUTE</b>	
45 U.S.C. § 151 (First).....	3
45 U.S.C. § 181.....	3
<b>SECONDARY SOURCES</b>	
Brent Garren, <i>NLRA and RLA Jurisdiction over Airline Independent Contractors: Back on Course</i> , 31 ABA J. LAB. & EMP. L. 77 (2015).....	5

## **STATEMENT OF THE CASE**

### **I. The Cause of Action and Procedural Posture**

On August 31, 2017, the National Labor Relations Board (NLRB) issued its Order Consolidating Cases, Consolidated Complaint and Notice of Hearing. The relevant portion of the Consolidated Complaint (Complaint) alleges that Eulen America violated Sections 8(a)(1) and Section 8(a)(3) of the National Labor Relations Act (NLRA). More specifically, the Complaint alleges that Eulen America discharged a Joanne Alexandre because she engaged in protected concerted activity by striking with co-workers. Eulen America denies this allegation.

Eulen America also asserts that it is not an employer within the meaning of the NLRA, but rather, a carrier as defined by the Railway Labor Act, for the evidence in this case proves that Eulen America is controlled by a carrier under the factors set forth in applicable decisions of the NLRB and the National Mediation Board. Therefore, Eulen America is under the exclusive jurisdiction of the RLA. On November 13-16, 2017, a hearing was held to present evidence regarding the allegations in the Complaint and the issue of jurisdiction. On January 30, 2017, the Judge issued his Decision and Recommended Order determining that the Board has jurisdiction and that Eulen America's discharge of Alexandre and its refusal to rehire her violated the Act.

Although Eulen America continues to deny any alleged retaliatory treatment, Eulen America takes exception to the Judge's Decision regarding jurisdiction. Therefore, Eulen America will argue in this Amended Brief in Support of its Exceptions that Eulen America meets the NMB's traditional two-part function and control test and is therefore under the exclusive jurisdiction of the RLA. Eulen America respectfully requests the NLRB to find Eulen America subject to the RLA. Alternatively, like the NLRB's recent request in *Oxford Electronics d/b/a Oxford Airport Technical Services*, Case No. 13-CA-115933 (Feb. 23, 2018), Eulen America requests the NLRB

seek an advisory opinion from NMB as to whether Eulen America is subject to the RLA.

## **II. The Relationship Between Airline Carriers and Eulen America**

Eulen America is a Florida limited-liability company, headquartered in Miami, Florida, and provides aviation support services for various airline carriers throughout the country. ALJ pg. 4 ¶ 26. The location relevant to the instant case is the Fort Lauderdale-Hollywood International Airport, otherwise known as the FLL station. ALJ pg. 4 ¶ 28-29. Eulen America contracts with 6 different carriers at the FLL station: American Airlines, Bahamasair, Delta Airlines, JetBlue, Spirit Airlines, and WestJet. ALJ pg. 4 ¶ 40-43; pg. 5 ¶ 1-4. The services Eulen America provides to these carriers are as follows:<sup>1</sup>

<b>American Airlines</b>	checkpoint and janitorial services
<b>Bahamasair</b>	bag room and cabin cleaning services
<b>Delta Airlines</b>	checkpoint, janitorial, and cabin cleaning services
<b>JetBlue</b>	checkpoint services
<b>Spirit Airlines</b>	cabin cleaning services
<b>WestJet</b>	bag room, cabin cleaning, counter (passenger service), janitorial, and ramp services

*Id.*; Tr. 571:5-10; 561:3-6 (Delta Airlines). To add, Eulen America employs approximately 172 rank-and-file employees and 19 supervisors at the FLL station, all of whom are responsible for providing the above-mentioned carriers with the above-mentioned services. ALJ pg. 5 ¶ 7-8. The approximate number of Eulen America personnel assigned to each carrier is as follows:

<b>American Airlines</b>	10 - 12
<b>Bahamasair</b>	20
<b>Delta Airlines</b>	40
<b>JetBlue</b>	10 - 12
<b>Spirit Airlines</b>	50 - 60
<b>WestJet</b>	25 - 30

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<sup>1</sup>There is no dispute that the above-mentioned services Eulen America provides to the various carriers at the FLL station is work that has been traditionally performed by airline carriers themselves. (ALJ pg. 5 ¶ 6-7) (citing General Counsel's opening statement at Tr. 27 and the Union's post-hearing brief at page 21).

ALJ pg. 5 ¶ 14-19. The highest-ranking official assigned to the FLL station and employed by Eulen America is Ms. Yasmin Kendrick, who was assigned to the FLL station in February of 2016 from a previous Eulen America location. ALJ pg. 5 ¶ 9-10.

### **ISSUE**

The issue here is whether the ALJ erred when he decided that Eulen America is an employer as defined by the NLRA. ALJ pg. 2 ¶ 8-9; pg. 4 ¶ 29-30; pg. 22 ¶ 4-5; pg. 22 ¶ 10-13; pg. 22-24 (Appendix).

### **ARGUMENT**

#### **I. Eulen America Meets the NMB's Traditional Function and Control Test and is Therefore Subject to the Exclusive Jurisdiction of the RLA**

1. Exceptions # 1, 36-57  
The ALJ Erred Because he Employed the New Approach to Determine Carrier Control and Erroneously Ignored the Traditional Function and Control Test

The Hearing Officer's jurisdictional analysis and conclusions is flawed. Eulen America meets the NMB's traditional function and control test and is therefore subject to the exclusive jurisdiction of the RLA. Congress enacted the RLA to prevent labor strife in the railway and airline industries from disrupting nationwide commerce due to their unique roles in serving the traveling and shipping public in interstate commerce. *ABM Onsite Services-West, Inc. v. National Labor Relations Board*, 849 F.3d 1137, 1139 (D.C. Cir. 2017) (citing *Verrett v. SABRE Grp., Inc.*, 70 F. Supp. 2d 1277, 1281 (N.D. Okla. 1999)). Therefore, under the RLA, various mediation and arbitration boards such as the NMB work to resolve such labor strife consistent with this purpose. *Id.* In 1934, Congress expanded the RLA's coverage to companies "directly or indirectly owned or controlled by or under common control with any carrier." 45 U.S.C § 151 (First); 45 U.S.C. § 181. Congress noticeably intended to prevent employees of carrier subsidiaries or other related

companies such as Eulen America from also interrupting commerce or carrier operations engaged in commerce to further effectuate the RLA's purpose.

Absent a statute specifically instructing the NLRB and the NMB on how to determine which companies are subject to Congress's expansive coverage, the NLRB and the NMB have jointly developed the method for determining their mutual jurisdictional question of whether the NLRA or the RLA controls. *ABM Onsite*, 849 F.3d 1137 at 1140. As made apparent by the NLRB's most recent request in *Oxford Electronics d/b/a Oxford Airport Technical Services*, Case No. 13-CA-115933 (Feb. 23, 2018), the NLRB has traditionally referred the jurisdictional question to the NMB for an advisory opinion and then defers to the NMB's opinion due to its expertise in administering the RLA. *ABM Onsite*, 849 F.3d 1137 at 1140 (citing *United Parcel Serv., Inc.*, 318 NLRB 778, 780 (1995) ("referring cases to the NMB 'enables the [NLRB] to obtain the NMB's expertise on jurisdictional matters most familiar to it'")). However, Eulen America recognizes that the NLRB is not required by law to refer the jurisdictional question to the NMB. Nevertheless, when the NLRB declines to refer to the NMB, the NLRB typically follows NMB precedent in deciding the matter. ALJ pg. 14 ¶ 35-37; *United Parcel Serv., Inc.*, 318 NLRB 778 at 781.

In 1980, the NMB reevaluated its jurisdictional standards due to changing corporate relationships and the increase of contractors performing work integral to carrier operations. *ABM Onsite*, 849 F.3d 1137 at 1142 (citing *Bhd. Ry. Carmen of the U.S. & Can.*, 8 NMB 58, 61 (1980)). Since then, the NMB has developed 6 factors to assist it in determining whether a company is controlled by a carrier as contemplated by Congress's expansive coverage under the RLA. *ABM Onsite*, 849 F.3d 1137 at 1142 (citing *Air Serv. Corp.*, 33 NMB 272, 285 (2006)). The 6 factors are as follows:

- (1) The extent of the carriers' control over the manner in which the company conducts its business;
- (2) the carriers' access to the company's operations and

records; (3) the carriers' role in the company's personnel decisions; (4) the degree of carrier supervision of the company's employees; (5) whether company employees are held out to the public as carrier employees; and (6) the extent of the carriers' control over employee training.

*Id.* The traditional standard for satisfying the above-mentioned factors is the degree of influence a carrier has over discharge, discipline, wages, working conditions and operations, as opposed to evidence which proves that a carrier hired, fired, set wages, hours, and working conditions of the company's employees. *ABM Onsite*, 849 F.3d 1137 at 1142; *ABM-Onsite Services*, 45 NMB 27, 34-35 (2018). Stated differently, a carrier does not have to dictate decisions over employee discharge, discipline, wages, working conditions and operations; it simply has to exercise some significant influence over these aspects of the employment relationship. *ABM Onsite*, 849 F.3d 1137 at 1143; *ABM-Onsite Services*, 45 NMB at 35, n.2 (2018).

There is a plethora of RLA opinions which found carrier control under this traditional standard between the mid-1990's to 2011. *See ABM Onsite*, 849 F.3d 1137 at 1143 (citing Brent Garren, *NLRA and RLA Jurisdiction over Airline Independent Contractors: Back on Course*, 31 ABA J. LAB. & EMP. L. 77, 93 (2015) (stating "the NMB 'found RLA jurisdiction in all but one of over thirty [such] airline-control cases' it considered between the mid-1990s and 2011")). Yet in 2013, the NMB departed from its traditional standard and began to require evidence which proved that a carrier exercised substantial degree of control over the firing and discharge of a company's employees before it would find jurisdiction under the RLA. *ABM Onsite*, 849 F.3d 1137 at 1144. However, the NMB never explicitly disavowed nor explained its reasoning for departing from its traditional standard. *Id.* at 1146.

As the NLRB is aware, in *ABM Onsite Services-West, Inc. v. National Labor Relations Board*, 849 F.3d 1137 (D.C. Cir. 2017), the Court of Appeals for the District of Columbia reviewed the NLRB's determination that the company did not prove carrier control and was therefore subject

to NLRA jurisdiction. *Id.* at 1139. The Court vacated the NLRB’s decision and questioned the NLRB’s unexplained endorsement of the NMB’s decision to depart from its long-standing precedent which employed the traditional standard. *Id.* at 1147.

In conformity with the Court’s opinion, on May 18, 2017, the NLRB requested an opinion from the NMB regarding whether the company’s operations and employees in the *ABM Onsite* matter were subject to the RLA. *ABM-Onsite Services*, 45 NMB 27 (2018). On February 26, 2018, the NMB opined that the company’s operations and employees at the airport in question were subject to the RLA. Notably, the NMB reaffirmed its “traditional test for determining whether an entity is a derivative carrier and its reliance on multiple factors to establish the required control by a carrier for RLA jurisdiction.” (emphasis added). *Id.* Moreover, the NMB explicitly held:

“[m]indful of its [Congress’s] statutory mission, the Board finds that the rail or air carrier must effectively exercise a significant degree of influence over the company’s daily operations and its employees’ performance of services in order to establish RLA jurisdiction. No one factor is elevated above all others in determining whether this significant degree of influence is established.” *Id.* at 34-35.

(emphasis added). Further, the NMB overruled its prior opinions which departed from the traditional standard as reflected in footnote number 2 of its opinion. *Id.* at 35, n. 2. To that end, it is imperative to note that the ALJ in the instant case has significantly, if not entirely, relied on prior NMB precedent which is no longer consistent with the reaffirmed traditional approach recently taken by the NMB in *ABM-Onsite Services*, 45 NMB 27 (2018). For example, the Judge stated in his Decision the following:

“[r]ecent NMB decisions not finding RLA jurisdiction have ‘emphasized in particular the absence of [carrier] control over hiring, firing, and/or discipline.’ *Allied Aviation Service Co. New Jersey*, 362 NLRB No. 173, slip op. at 1 (2015), petition for review denied 854 F.2d 55 (D.C. Cir. 2017), petition for certiorari denied, --S. Ct.--, 2017 WL 4224908 (mem.) (November 13, 2017), citing *Airway Cleaners, LLC*, 41 NMB 262, 268 (2014), and *Menzies Aviation, Inc.*, 42 NMB 1, 7 (2014). The control over personnel decisions must be “meaningful” and “not just the type of control found in any contracts for services” to establish RLA

jurisdiction. *Airway Cleaners* at 268, citing *Bags*, above at 170.

ALJ pg. 15 ¶ 33-40. The ALJ concluded his jurisdictional analysis with, “I note in particular the essentially nonexistent role that the airlines play in Eulen’s hiring, disciplining, firing, directing, or supervising.” ALJ pg. 17 ¶ 33-35. Considering the NMB’s recent reaffirmation of the traditional standard, Eulen America believes that the NLRB should similarly employ the traditional standard when analyzing the six factors here. Thus, unlike the ALJ’s analysis, the ensuing analysis will reference precedent in-line with the traditional standard. To that end, the evidence set forth below, and in Eulen America’s Exceptions, unequivocally proves that various carriers at the FLL station exert a significant degree of influence on all aspects of Eulen America’s employees and operations.

2. Carriers at The FLL Station Exercise Direct And Indirect Control Over Eulen America Sufficient to Support RLA Jurisdiction
  - i. **Exceptions # 1, 5-7, 20-21, 31, 35-39, 40-41, 43-44, 46-48, 53-63**  
***Carrier Contracts Set the Services to be Provided; Set Compliance Measures with Carrier Performance Standards, Policies, Procedures, and Manuals; Permits Carrier Auditing of Eulen America Operations; and Even Sets Overtime/Holiday Rates***

The contracts between Eulen America and various carriers at the FLL station exhibit a significant degree of influence indicative of carrier control. Service agreements have historically been the primary evidence of a carrier’s influence over the 6 factors. *See e.g., Swissport USA, Inc.*, 35 NMB 190, 196 (2008) (relying on the service agreements between Swissport and its carrier customers as evidence that the carriers “dictate nearly all aspects of Swissport’s operations”). In *ABM-Onsite Services*, 45 NMB 27, 35 (2018), the NMB found the company’s requirement to provide services specifically described in the contract as sufficient evidence to establish significant degree of influence. *See also Air Serv. Corp.*, 33 NMB 272 (2006) (RLA jurisdiction was established and the NMB found in part that the carrier regulated cleaning guidelines and procedures for servicing the aircraft).

Here, all six carriers Eulen America contracts with at the FLL station set forth detailed service specifications that the Eulen America FLL station employees assigned to the respective carrier account must follow when performing their work. Jt. Ex. 6 pg. 1 of 24; pg. 18 of 24; Jt. Ex. 7 pg. 4-11 of 18; pg. 14-18 of 18 (American Airlines);<sup>2</sup> Jt. Ex. 9 pg. 2 of 7 - Section 3 - Jt. Ex. 26 (Jan. 2013 IATA) pg. 20-22 of 61; pg. 24-27 of 61 (Bahamasair); Jt. Ex. 10 pg. 2 of 80; pg. 40 of 80; pg. 44 of 80; pg. 47 of 80; Jt. Ex. 12 pg. 13 of 21; pg. 18-21 of 21 (Delta Airlines); Jt. Ex. 14 pg. 5 of 11 (JetBlue); Jt. Ex. 15 pg. 1 of 10; Jt. Ex. 25 (Jan. 2004 IATA) pg. 27-29 of 39 (Spirit Airlines); Jt. Ex. 17 pg. 1-15 of 29 (WestJet).

In addition to the service specifications required by Spirit Airlines cited above, Spirit Airlines also requires cabin cleaning agents assigned to its account to complete and submit to Spirit Airlines a Spirit Airlines generated Aircraft Appearance Standards form for cabin cleaning shifts. Jt. Ex. 15 pg. 8-10 of 10. The forms specifically set forth a checklist of services the cabin cleaning agents must perform prior to the completion of all tasks. *Id.* To that end, Spirit Airlines also dictates the allotted amount of time for cabin cleaning services if ground times are reduced due to flight delays. Jt. Ex. 15 pg. 6 of 10. Spirit Airlines has prioritized the order in which the cabin cleaning agents must clean the cabin in the event a circumstance of this kind occurs. *Id.* The prioritization is as follows: (1) lavatories; (2) galleys; and then (3) the passenger cabin.

Additionally, evidence which proves that services rendered must be in accordance with carrier policies, procedures, and manuals, is sufficient evidence to establish carrier control. *ABM-*

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<sup>2</sup>American Airlines also requires Eulen America to provide all employees with written instruction requiring compliance with the service specifications and the requirement that the employee fully cooperate with American Airlines personnel. Jt. Ex. 6 pg. 18 of 24. Further, Eulen America must provide American Airlines with additional services not contemplated or specified at American Airlines request. Jt. Ex. 6 pg. 2 of 24. Notably, American Airlines may issue Eulen America liquidated damages if services rendered fail to meet the American Airlines service specifications. Jt. Ex. 6 pg. 2 of 24.

*Onsite Services*, 45 NMB 27, 31 (2018) (RLA jurisdiction was established and the NMB found in part that the company is required to follow operational procedures developed by PAC); *see also Bradley Pacific Aviation, Inc.*, 350 NLRB 583 (2007) (RLA jurisdiction was established and the NLRB found in part that the company was required to follow operating procedure “as well as specific procedures in manuals”); *see also Integrated Airline Services, Inc.*, 29 NMB 196 (2002) (RLA jurisdiction was established and the NMB found in part that the company was required to adhere to carrier procedural manuals).

Here, WestJet requires Eulen America FLL station employees assigned to its account to comply with WestJet’s Ground Operations Manual (GOM), Grooming Task Card, and, as articulated in greater detail below, its Service Level Agreement (SLA). Jt. Ex. 17 pg. 17 of 29. Notably, the WestJet Grooming Task Card sets forth detailed information regarding Eulen America’s cabin cleaning services, including the products to be used, the process to follow, and the requisite signatures required once the cabin cleaning agents finish their tasks. Jt. Ex. 17 pg. 16 of 29. Similarly, Delta Airlines requires all services rendered to be performed in full compliance with Delta Airlines standard practices, including but not limited to, Delta Airlines Ground Operations Manual (GOM) and Delta Airlines Environmental Program Manual. Jt. Ex. 10 pg. 2 of 80. Additionally, Delta Airlines even requires Eulen America to comply with the principals of ethics and conduct set forth in a Delta Airlines booklet entitled “Doing Business with Delta.” Jt. Ex. 10 pg. 6 of 80.<sup>3</sup>

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<sup>3</sup>JetBlue requires all services rendered to be in accordance with approved JetBlue supplied data and instructions and JetBlue’s General Procedures Manual and JetBlue Policies. Jt. Ex. 13 pg. 3-4 of 40; pg. 12-13 of 40. Further, American Airlines requires all services rendered to be in accordance with all specifications set forth in American Airlines manual, guides, training and documents. Jt. Ex. 6 pg. 18 of 24. Additionally, American Airlines requires Eulen America to maintain internet, electronic mail and other similar capabilities necessary to access American Airlines manuals. Jt. Ex. 6 pg. 18 of 24.

Carrier performance requirements are regularly cited as sufficient evidence to establish carrier control. *See ABM-Onsite Services*, 45 NMB 27, 35 (2018) (RLA jurisdiction was established and the NMB found in part that the company was required to meet “performance measures specified in the contract”); *see also Bradley Pacific Aviation, Inc.*, 350 NLRB 583 (2007) (RLA jurisdiction was established and the NLRB found in part that the carriers monitor compliance and service standards); *see also Air Serv. Corp.*, 37 NMB 272 (2006) (RLA jurisdiction was established and the NMB found in part that although the company supervised its own employees, the carrier exercised a great deal of control through comprehensive monitoring of the contracts performance).

Here, Delta Airlines can unilaterally adjust Eulen America’s cabin cleaning invoices based on Delta Airlines cabin cleaning survey scores. Jt. Ex. 12 pg. 11 of 21. Within 5 business days following the end of each month, Delta Airlines submits to Eulen America cabin cleaning survey scores based on the cabin cleaners’ performance from the preceding month. *Id.* Within 10 business days following the end of each month, Eulen America shall then submit invoices to Delta Airlines reflecting adjustments made to such invoices due to the scores. *Id.* The results of the survey scores may affect invoices based on a specified matrix which Delta Airlines has set forth contractually. *Id.* Similarly, Delta Airlines rates cabin cleaning performance based on whether cabin cleaners cause delays to its flights. Jt. Ex. 12 pg. 11 of 21. Like the above-mentioned survey scores, Eulen America’s invoices may also be adjusted based on specific parameters Delta Airlines has set forth contractually. Jt. Ex. 12 pg. 12 of 21. Furthermore, and as articulated above, WestJet requires Eulen America to comply with its Service Level Agreement (SLA) which outlines the manner in which employee performance is reviewed and measured to determine whether Eulen America has met key performance indicators, otherwise known as KPI’s. Jt. Ex. 17 pg. 26-29 of 29. WestJet

also requires Eulen America to communicate with its employees the parameters of WestJet's performance targets. *Id.* The WestJet contract states in pertinent part:

The Carrier [WestJet] will set and provide to Handling Company [Eulen America] monthly, quarterly and yearly performance targets for each calendar year on or before December 1<sup>st</sup> of the previous year. The Handling Company [Eulen America] is entitled to review the performance targets and submit to the Carrier [WestJet] any proposed amendments by December 7<sup>th</sup>. Any amendments must be approved by the Carrier [WestJet], acting in its sole discretion, by December 15<sup>th</sup>. The Handling Company [Eulen America] is responsible to communicate the performance targets to its agents.

Jt. Ex. 17 pg. 26 of 29. Related to the performance standards illustrated above, carriers also possess the ability to monitor and audit Eulen America's operational activity in ways indicative of carrier control. For example, supervisors employed by Spirit Airlines frequently audit the performance of cleaning agents assigned to its account. The audits occur on a weekly basis. ALJ pg. 7 ¶ 14-17. When the Spirit Airlines supervisor is conducting the audit, he or she utilizes a set check-list criterion which is generated from a Spirit Airlines system called Q-Pulse. Tr. 239-240; 241:1-7. Once the supervisor is complete with his or her audit, the Spirit Airlines supervisor then enters the results articulated on the set check-list into Spirit Airlines Q-Pulse system for the review for Spirit Airlines cabin cleaning appearance team. *Id.* To add, WestJet reserves the right to audit Eulen America's activity at any time, even after the conclusion of the contractual relationship between Eulen America and WestJet, to ensure compliance with the policies and procedures set forth in the WestJet Ground Operating Manual (GOM) and any other contractual obligation required of Eulen America. (Jt. Ex. 17 pg. 18 of 29). WestJet may also issue Eulen America various action plans because of the above-mentioned audits.<sup>4</sup> *Id.*

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<sup>4</sup>To add, WestJet requires Eulen America to adhere to all applicable safety regulations included rules promulgated under the Canada Labour Code. Jt. Ex. 17 pg. 19 of 29. Delta Airlines requires Eulen America to set forth compliance programs and requirements to assure that services rendered comply with applicable laws, rules, regulations, and procedures. Jt. Ex. 10 pg. 5 of 80. Delta

The ALJ erroneously found that American Airlines does not conduct regular audits or evaluations of Eulen America's work. ALJ pg. 7 ¶ 21-23. Yet, Kendrick testified that at least once a month an American Airlines supervisor observes the Eulen America FLL station checkpoint services, and as a result, American Airlines will call or send Ms. Kendrick an email informing her about any deficiencies in performance or even positive feedback. Tr. 523:6-18. Kendrick also testified that at least once a month an American Airlines supervisor audits to determine whether services have changed. Tr. 523:12-19. As an example, American Airlines has communicated with Kendrick about its observations regarding the improper location of a checkpoint agent.<sup>5</sup> *Id.*

Further, carrier access to company records and books has often been viewed as sufficient carrier control. *See ABM-Onsite Services*, 45 NMB 27, 30 (2008) (RLA jurisdiction was established and the NMB found in part that under the contract PAC required all records to be open to inspection); *see also Air Serv. Corp.*, 33 NMB 272 (2006) (RLA jurisdiction was established and the NMB found in part that the carrier could access the company's records regarding personnel, maintenance, and training). Here, the record is replete with evidence which proves that carriers may audit Eulen America's books and records regarding services rendered. ALJ pg. 8 ¶ 34-38 (citing Jt. Ex. 7 pg. 4 (American Airlines); Jt. Ex. 10 pg. 10 (Delta Airlines); Jt. Ex. 13 pg. 5 (JetBlue); Jt. Ex. 15 pg. 7 (Spirit Airlines)). Contrary to the ALJ's findings, such auditing

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Airlines reserves the right to audit Eulen America's compliance programs and requirements at any time. *Id.* Further, JetBlue reserves the right to request from Eulen America activity reports and even dictates the email subject line Eulen America must use when emailing such reports. Jt. Ex. 13 pg. 11 of 40. The example provided is as follows: "Ground Handling-City-Company- Month-Year-Month Report (Example: Janitorial-FLL-ASMOS-June 09-Monthly Report)." *Id.*

<sup>5</sup>Additionally, American Airlines reserves the right to require Eulen America to implement a quality assurance process, including periodic audits of such process, which must be approved in writing by the American Airlines manager. Jt. Ex. 6 pg. 18 of 24. Further, American Airlines maintains unrestricted access to any facilities used by Eulen America to monitor the performance of services in progress. Jt. Ex. 6 pg. 1 of 24.

capabilities even extends to employee personnel information in addition to records and books regarding services rendered, as made apparent by JetBlue's contract. As such, JetBlue reserves the right to access and review records which reflect employee grievances and disciplinary actions. Jt. Ex. 13 pg. 12-13 of 40.

Moreover, carrier establishment of pay rates is indicative of sufficient carrier control. *See Worldwide Flight Services, Inc.*, 31 NMB 386, 388 (2004) (RLA jurisdiction was established and the NMB found in part that the carrier contract detailed payment of overtime). The various carrier contracts set forth the applicable holiday or overtime rate and specify which holidays such holiday rate applies to. Jt. Ex. 9 pg. 3 of 7 (Bahamasair); Jt. Ex. 16 (Spirit Airlines); Jt. Ex. 14 pg. 5 of 11 (JetBlue); Jt. Ex. 7 pg. 12 of 18; Jt. Ex. 8 pg. 1 of 2 (American Airlines).<sup>6</sup> By way of example, Delta Airlines has contractually set forth an overtime and holiday rate for those employees assigned to checkpoint services. (Jt. Ex. 12 pg. 3 of 21). Delta Airlines has explicitly stated that the holidays include: New Year's Day, Easter, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day. Jt. Ex. 12 pg. 5 of 21. Additionally, Delta Airlines must authorize all overtime hours. *Id. See Kannon Serv Enterprise Corp.*, 31 NMB 409, 413 (2004) (RLA jurisdiction was established and the NMB found in part that Delta Airlines must authorize the use of overtime hours before overtime can be used).

**ii. Exceptions # 1, 22-32, 36-38, 46-50, 53-60, 62, 63  
*Carrier Training***

Moreover, the various carriers Eulen America contracts with at the FLL station exercise a significant degree of influence over Eulen America's training. If the carrier requires training, then Eulen America utilizes the carrier's training protocol and training path. Tr. 472:12-19. *See*

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<sup>6</sup>Please note that the applicable overtime and holiday rate only applies to the checkpoint agents which are identified as (PVA/Docs Checker). (Jt. Ex. 8 pg. 1 of 2).

*Swissport USA, Inc.*, 353 NLRB 145 (2008) (RLA jurisdiction was established and the NLRB found in part that the carrier dictates the type of training the employee must receive); *see also Ogden Ground Services*, 339 NLRB 869 (2003) (RLA jurisdiction was established and the NLRB found in part that the employer was required to follow a carrier's operation and training manual). Moreover, if the carrier is not the entity directly teaching its training protocol and training path to the employees, then a Eulen America representative will teach the carrier's training requirements on the carrier's behalf. (Tr. 449:11-25). *See ABM Onsite*, 849 F.3d 1137 at 1143 (The Court vacated the NLRB's decision finding NLRA jurisdiction and found in part that when the Consortium general manager does not do the training himself, the Consortium still provides the training materials and dictates the procedures to be followed); *see also Bradley Pacific Aviation, Inc.*, 350 NLRB 583 (2007) (RLA jurisdiction was established and the NLRB found in part that some carriers designate carrier trainers who then train other employees).

However, before the Eulen America training representative may do so, the carrier requires the representative to attend its training-the-trainer or trainer-training course to teach the representative its training requirements. *Id.* Provided the representative successfully completes the carrier's train-the-trainer course, then the carrier has authorized the representative to administer its training requirements to the pertinent Eulen America FLL station employees assigned to its account. *Id.*

More specifically, the ALJ accurately found that Delta Airlines establishes the requisite training path for cabin cleaning agents assigned to its account, which Mr. Foster, Eulen America's Director of Corporate Safety and Compliance, testified is the bulk of services provided to Delta Airlines at the FLL station. ALJ pg. 7 ¶ 41-42; Tr. 432:17-20. Yet, the ALJ omitted the scope of Delta Airlines training path which undoubtedly supports a greater showing of influence. Delta

Airlines has created 7 courses the cabin cleaning agents must attend and successfully complete to qualify to work on its account. Resp. Ex. 5 pg. 4 of 6. Those courses are: (1) Cabin Cleaning Agent (Methods and Tools); (2) Cabin Cleaning Agent (On-The-Job); (3) Annual Qualification Training (AQT); (4) Regulated Garbage; (5) Lavatory Services Cleaning; (6) Portable Water Services Recurrent; and (7) Powered Industrial Truck. (Resp. Ex. 5 pg. 4 of 6). Each course is either computer based training (CBT) or on-the-job training (OJT) taught by an authorized training representative. Tr. 432:21-25; 433:1-14.

The CBT training occurs in Delta Airlines space on computers owned by Delta Airlines. Tr. 434:20-25; 435:1-11; 456:1-25; 457:1-4. While the cabin cleaning agent is on the computer engaged in his or her respective training, he or she reviews training modules and completes tests generated by Delta Airlines. *Id.* Delta Airlines will not authorize the cabin cleaning agent to work on its planes until the agent passes its test. Tr. 435:1-5. Regarding OJT courses, Eulen America has an authorized representative teach the applicable course. ALJ pg. 7 ¶ 43-44; Tr. 432:21-25; 433:1-14; 449:11-25. As previously mentioned above, the representative must complete a Delta Airlines trainer-training course before doing so. Tr. 433:1-14. To elaborate, Delta Airlines requires the representative to attend trainer-training at its headquarters in Atlanta, Georgia. Tr. 433-434. For example, Mr. Foster and Ms. Kendrick traveled to Atlanta to attend an 8-hour trainer-training course taught by Delta Airlines and after the course they were then required to pass an examination issued by Delta Airlines. *Id.* Mr. Foster and Ms. Kendrick were also required to attend a Delta Airlines requalification course because Delta Airlines modified certain cabin cleaning protocols. Resp. Ex. 6 pg. 15-17 of 33; Tr. 453-455. Mr. Robert McCraine, who was a former Eulen America employee and authorized trainer, also attended the course with them. *Id.* The requalification course was held in Minneapolis, Minnesota. *Id.* After the conclusion of their attendance at the

requalification course, Mr. McCraine returned to the FLL station and taught new cabin cleaning courses to communicate his newly acquired knowledge to the cabin cleaning agents. *Id.* Mr. Foster did the same at Eulen America's Tampa and Tallahassee locations in Florida and Eulen America's Milwaukee location. *Id.*

Furthermore, Delta Airlines requires all Eulen America FLL station employees assigned to its account to successfully complete Delta Airlines Annual Requalification Training (AQT). (Resp. Ex. 6). Delta Airlines sends Eulen America a monthly report which outlines a list of employees who must attend AQT. *Id.*; *see also*, Resp. Ex. 6 pg. 28-31 of 33 which is a Delta Airlines report of those employees who completed AQT.<sup>7</sup> The AQT is conducted on the above-mentioned computers owned by Delta Airlines in the Delta Airlines space. Tr. 444:19-25; 445:1-11. The Delta Airlines generated training modules associated with AQT cover topics such as aircraft security awareness, technical data, and focuses on Delta Airlines cabin cleaning protocol. *Id.*

The ALJ erroneously found that approximately 60% of AQT is mandated by various federal agencies as opposed to Delta Airlines' own requirements. ALJ pg. 8 ¶ 6-10. However, when Foster was asked to testify about the percentage he was ultimately unsure without consulting additional information. Tr. 439-440. The conclusion was that some were mandated by federal agencies and some were not. *Id.* Nevertheless, the percentage is immaterial. The fact remains that the carrier, Delta Airlines, requires Eulen America to engage in training protocol that it would not otherwise require of its employees but for Delta Airlines instruction, a rationale which more readily comports with the carrier control analysis. *See e.g., Globe Aviation Services*, 334 NLRB 278

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<sup>7</sup>PPR represents an individual employee's Delta Learning Management System identification number, which is provided by Delta Airlines after its receipt of basic employee information from Eulen America such as name, date of birth, and department. Tr. 481-482. DOE represents the employee's date of employment. Dept. 139 represents cabin cleaning services. *Id.* And the last column represents when the employee completed AQT.

(2001) (RLA jurisdiction was established and the NLRB found in part that the carrier requires the employees to complete a background check and/or an alcohol and drug test if required by the Federal Aviation Administration (FAA) or airline policy).

Like Delta Airlines above, Spirit Airlines has similar training requirements for the Eulen America FLL station cabin cleaning agents assigned to its account. Tr. 449-450. Spirit Airlines also conducts its own version of CBT training and trainer-training. *Id.* Similar to Delta Airlines, Spirit Airlines owns the computers the cabin cleaning agents use when engaged in CBT and generates the training modules displayed on the computers. *Id.*

Moreover, WestJet requires all Eulen America FLL station employees assigned to its account to undergo an initial training period upon hire pursuant to WestJet's training matrix. Tr. 450:23-25; 451-452:1-9; Jt. Ex. 17 pg. 14-17 of 29. To reiterate, these employees do not receive any other training aside from what WestJet provides. Tr. 490:24-25; 491:1-3. Like Delta Airlines and Spirit Airlines above, WestJet also requires Eulen America to designate a training representative, who received trainer-training, to administer WestJet's training requirements to the employees. Tr. 449:11-25; Jt. Ex. 17 pg. 14 of 29. The WestJet contract specifically requires the training representative's presence at the FLL station and expects the representative to complete on-site training activities, including but not limited to, training new passenger or ramp service agents as required by WestJet, update training materials and records, and have available at all times during the contract, valid government issued travel documents to allow entry and travel to Canada which is WestJet's main terminal. Jt. Ex. 17 pg. 14 of 29. If circumstances force the trainer-training away from the FLL station, WestJet will arrange and provide for the training representative's airfare, living, and accommodation expenses for the training to occur elsewhere. *Id.*

Mr. Foster testified that the duration of WestJet's training for those employees assigned to

the WestJet account is dependent on the services provided. Tr. 450:23-25; 451-452:1-9. All above-wing services, such as ticket counter services (passenger services), is approximately 2 weeks. *Id.* As compared to below-wing services, such as ramp, bag room, or cabin cleaning services, which is approximately 3 days. *Id.* For both the above-wing and below-wing training, the employee is issued a WestJet generated test during each day of training. *Id.* Additionally, those employees who intend to engage in below-wing services are also issued a WestJet generated comprehensive test at the conclusion of their training. *Id.* Notably, the training materials and tests are created and provided by WestJet. *Id.* If the Eulen America FLL station employee cannot successfully complete the training, he or she cannot work on the WestJet account. *Id.* The record contains Eulen America separation forms which corroborates this assertion. Resp. Ex. 3 pg. 4-5 of 10. For instance, the separation form of Ms. Ekta Kawadiya states in pertinent part, “WestJet trainee who did not pass training. Refused other position offered.” *Id.* The separation form of Mr. Sam Jean Pierre states in pertinent part, “employee did not pass WestJet training.” *Id.* Furthermore, WestJet reserves the right to observe and audit Eulen America’s training to ensure that proper WestJet training is delivered. Jt. Ex. 17 pg. 16 of 29.

WestJet requires passenger service agents assigned to its account to conduct sale transactions on its behalf. Jt. Ex. 17 pg. 21-22 of 29. As such, WestJet provides all training regarding its procedures and policies for documenting the sale transactions. *Id.* Such training occurs during the initial training period for passenger service agents. *Id.* Furthermore, WestJet provides all associated training materials for Eulen America’s use. *Id.* Eulen America passenger service agents are required to conduct sale transactions on behalf of WestJet while using WestJet’s computer system. *Id.* WestJet also requires the passenger service agent to assure all WestJet policies and procedures are adhered to when payments are received and recorded per WestJet’s

instructions. *Id.* WestJet even requires Eulen America to deposit the transactional payments collected in a bank account and provide it with documentation to show all daily transactions. *Id.* Such documentation is subject to inspection by WestJet's representative at any time. *Id.*

Further, the WestJet contract requires Emergency Response (ER) training for passenger service agents. Jt. Ex. 17 pg. 15 of 29. WestJet requires the FLL station manager, training representative, and designated ER contact, if different than the manager or training representative, to attend the ER training as well. *Id.* WestJet also requires recurring ER training and an applicable audit 3 to 6 months after the initial ER training session. *Id.* WestJet covers all costs for its trainer to teach the ER training as well as any costs for the materials provided. *Id.*

The WestJet contract also sets forth training requirements for the Eulen America FLL station ramp and cabin cleaning agents who perform services for the WestJet account. Jt. Ex. 17 pg. 15-16 of 29. To summarize, WestJet requires the ramp agents to attend classroom training. Jt. Ex. 17 pg. 15 of 29. Notably, WestJet also requires Eulen America to document the successful completion of familiarization training prior to the ramp agent's classroom training, which must be documented on WestJet's Pre-Session Learning Checklist. *Id.* Regarding cabin cleaning services, WestJet reserves the right to provide grooming training at WestJet's costs. Jt. Ex. 17 pg. 16 of 29. WestJet is responsible for all training hours, materials, and facility costs in the event WestJet's cabin cleaning operational needs change as well. *Id.* Lastly, WestJet provides the Eulen America FLL station with access and training to WestJet's Learning Management System (LMS), which Eulen America must use to register and update training records for WestJet's review. Jt. Ex. 17 pg. 16 of 29. Mr. Foster testified that LMS is like CBT, as described above. Tr. 452:10-24.

Additionally, the ALJ erroneously found that American Airlines does not require training. (ALJ pg. 8 ¶ 12). However, American Airlines has contractually set forth training requirements.

(Jt. Ex. 6 pg. 19 of 24). Notably, the American Airlines contract states that the Eulen America FLL station is required to render all services in accordance with all specifications set forth in American Airlines manuals, guides, training and documents. Jt. Ex. 6 pg. 18 of 24. As such, American Airlines requires Eulen America to provide all necessary training to perform American Airlines service specifications and requires Eulen America to maintain detailed records of all training necessary to comply with such training requirements. Jt. Ex. 6 pg. 19 of 24. Further, if American Airlines reasonably determines the level of training for 1 or more of Eulen America's employees who are assigned to its account is not compliant with its service specifications, then American Airlines may require Eulen America to institute additional training at its own cost and expense as American Airlines deems necessary to bring such employee to the level of training required to provide the relevant service specification. *Id.*

**iii. Exceptions # 1, 33, 36-38, 41, 46-48, 52-58, 61, 63**  
***Held Out to The Public as Carrier Employees/Representatives and Uniforms***

Evidence which proves that Eulen America's personnel are held out to the public as carrier personnel is indicative of carrier control. Here, the ALJ has failed to find facts relevant to Eulen America's capacity as WestJet's liaison. As such, WestJet provides no employees at the FLL station. Accordingly, Eulen America is responsible to serve as WestJet's representative at the FLL station and Ms. Kendrick serves as the liaison for WestJet. Tr. 496:14-19. As liaison, she attends monthly meetings conducted by Broward County Aviation Department (BCAD) at WestJet's request. Tr. 496:14-19; 498:10-18. The BCAD meetings are required of all airlines at the FLL station and is broken into 2 segments. Tr. 498:19-25; 499:1-9. The first segment pertains to various safety considerations at the airport, which Ms. Kendrick attends on behalf of Eulen America. *Id.* However, the second segment, which discusses various updates regarding airport operations such as new construction, new airlines, or new terminals, Ms. Kendrick attends in her capacity as liaison

for WestJet. *Id.* Importantly, Ms. Kendrick testified that if she was not liaison for WestJet she would not be required to attend the second segment required of the carriers. Tr. 499:3-8.

In addition, the ALJ accurately found that all Eulen America FLL station passenger service agents assigned to the WestJet account wear uniforms issued by WestJet, which is indicative of carrier control. ALJ pg. 8 ¶ 24-27. *ABM Onsite*, 849 F.3d at 1144 (The Court vacated the NLRB’s decision finding NLRA jurisdiction and found in part that the Consortium logo is on employee uniforms); *see also ABM-Onsite*, 45 NMB 27, 31 (2018) (same); *see also Swissport USA, Inc.*, 353 NLRB 145 (2008) (RLA jurisdiction was established and the NLRB found in part that “at least one carrier agreement require[ed] that the Employer provide carrier uniforms to the employees and that the employees appear to be employees of that carrier”); *see also Command Security Corp. d/b/a Aviation Safeguard*, 27 NMB 581 (2000) (RLA jurisdiction was established and the NMB found in part that the employees did not have to wear a carrier uniform but the carrier approved their attire).

However, the ALJ omitted the fact that these uniforms are the same uniforms the WestJet employees wear at its main terminal in Canada which also displays the WestJet logo. Tr. 507:9-25; 508:1-2. Furthermore, the WestJet contract sets forth requirements regarding how the uniforms must be presented and maintained. Jt. Ex. 17 pg. 15 of 29. For example, the pertinent contractual language states in part that the Eulen America FLL station “agrees to maintain care and control of all uniform pieces, and understands the uniform is to be kept in good repair, pressed and cleaned, and shall be returned to the Carrier [WestJet] upon request.” *Id.* Furthermore, WestJet offers the Eulen America FLL station with an online uniform ordering system which WestJet pays for. *Id.*

Moreover, the ALJ omitted contract language which requires Eulen America employees to work in a manner that gives the public the best impression of the respective carrier and the carrier’s

business. For instance, the JetBlue contract requires all employees assigned to its account to “act as JetBlue ambassadors and will make every effort possible to ensure customers live the JetBlue experience as of leaving the vehicle.” Jt. Ex. 14 pg. 5 of 11. Additionally, the American Airlines contract requires all employees assigned to its account to “maintain appearance standards that shall give the general public the best impression of American and air transport.” Jt. Ex. 6 pg. 19 of 24. *See Bradley Pacific Aviation, Inc.*, 350 NLRB 583 (2007) (RLA jurisdiction was established and the NLRB found in part that although the employees did not wear carrier uniforms or carrier insignia, the carrier contract required the employees to adhere to personal appearance and grooming standards).

**iv. Exceptions # 1, 34, 36-38, 41, 46-48, 51, 53-57, 60, 62-63  
*Supplies, Office Space, and Equipment***

Additionally, any facilities, supplies, and equipment used by the Eulen America FLL station, but provided by a carrier, is also relevant in determining carrier control. *Swissport USA, Inc.*, 353 NLRB 145 (2008) (RLA jurisdiction was established and the NLRB found in part that the employer used carrier equipment and facilities); *see also Air Serv. Corp.*, 33 NMB 272, 288 (2006) (RLA jurisdiction was established and the NMB found in part that the carrier provided many of the supplies used to service the plane); *see also Signature Flight Support*, 32 NMB 214 (2005) (RLA jurisdiction was established and NMB found in part that the company leased office space from the carrier); *see also Kannon Serv. Enterprise Corp.*, 31 NMB 409 (2004) (RLA jurisdiction was established and carrier provided office space); *see also Ogden Ground Services*, 339 NLRB 869 (2003) (RLA jurisdiction was established and the NLRB found in part that the employer subleased space from the carrier at submarket value).

Here, Delta Airlines provides the Eulen America FLL station cabin cleaning agents with a breakroom and supply room (collectively referred to as the “space”) which Delta Airlines leases

from the airport. Jt. Ex. 10 pg. 15-16 of 80; Jt. Ex. 12 pg. 8 of 21. Notably, Delta Airlines also provides all cabin cleaning supplies to the cabin cleaning agents, which will be discussed in greater detail below. Jt. Ex. 12 pg. 13 of 21; Tr. 502:10-25; 503:1-9. Delta Airlines provides the space with no charge against Eulen America's monthly charges. Jt. Ex. 12 pg. 8 of 21. Delta Airlines also determines in its sole discretion the size and location of the space and may also change the location of such space when it deems necessary. Jt. Ex. 10 pg. 15-16 of 80. Not only does Delta Airlines provide the space but it also provides all necessary utility services as well. *Id.* Delta Airlines even requires Eulen America to maintain cleanliness standards for the space it provides. *Id.* The Delta Airlines contract states that Eulen American, and by extension the cabin cleaning agents, must maintain the space in a neat, clean, and sanitary manner and shall not permit, trash, rubbish, or waste to accumulate. *Id.*

To add, Delta Airlines also provides the cabin cleaning agents with flight information display monitors located in the breakroom. Tr. 515-516; 556:6-20. Parenthetically yet importantly, the monitors alert the cabin cleaning agents of the airplanes' location at the FLL station upon its arrival. *Id.* The pertinent information displayed on the monitors is communicated to the cabin cleaning agents via Delta Airlines dispatchers who are Delta Airlines employees. *Id.* In addition to the aforementioned, Delta Airlines also provides 3 different pieces of equipment, namely vehicles, to further facilitate Eulen America's services. ALJ pg. 8 ¶ 29-30.

As briefly explained above, Delta Airlines provides all cabin cleaning supplies to the cabin cleaning agents which includes soaps, lotions, and solutions. Jt. Ex. 12 pg. 13 of 21; Tr. 502:10-25; 503:1-9. Furthermore, Delta Airlines also provides the blankets, pillows, informational cards, and sickness bags. *Id.* Moreover, the record proves that Delta Airlines orders all cabin cleaning supplies based on Eulen America's needs. *Id.* Ms. Kendrick testified that every Friday her assistant

provides the Delta Airlines manager, Ms. Alvarez, a report of the supplies used, the inventory still in stock, and any requests for additional supplies the following week. Tr. 502:10-25; 503:1-9. Delta Airlines then enters the report in its system and ultimately delivers to Eulen America the supplies requested. *Id.*

Like Delta Airlines above, Spirit Airlines also provides Eulen America with all cabin cleaning supplies to clean the interior cabin of its planes. Tr. 506:13-19. To add, WestJet provides all passenger service agents assigned to its account with all forms, baggage tags and other materials necessary for the passenger service agents to perform its handling services on WestJet's behalf. *Jt. Ex. 17 pg. 21 of 29.* The WestJet contract dictates that Eulen America may not use any other materials, but must manage inventory levels, and order replacement materials from WestJet's supplier. *Id.* WestJet is responsible for all costs associated with these materials which includes shipping. *Id.*

**v. Exceptions # 1, 8-9, 12-19, 36-39, 41-48, 53-57, 62-63  
*Hiring, Promotion, Discipline, Firing and Reassignment***

Furthermore, carriers at the FLL station have significant degree of influence over Eulen America's personnel decisions which is indicative of carrier control. It is imperative to reiterate here that the carrier does not need to dictate personnel decisions but rather exert a significant degree of influence and that no one factor is more important than the other when deciding carrier control. *ABM Onsite Services-West, Inc. v. National Labor Relations Board*, 849 F.3d 1137 (2017); *ABM-Onsite Services*, 45 NMB 27 (2018). The evidence proves that Eulen America places much weight on carrier recommendation for hire. Tr. 509:12-25; 510:1-12. For example, Ms. Alvarez, who is Delta Airlines manager, recommended to Ms. Kendrick that Eulen America hire a Delta Airlines employee named Mr. John Vixamar. Tr. 510:6-12. As such, Ms. Kendrick testified that she placed "a lot" of weight on Ms. Alvarez's recommendation and as a result hired Mr. Vixamar.

Tr. 510:10-12. Notably, Mr. Vixamar is now an employee for both Delta Airlines and Eulen America. Tr. 509:18-20. He works for Delta Airlines in the morning as a Delta Airlines ramp employee and then works as a Eulen America employee in the afternoon as a FLL station lavman. Tr. 509:21-25; 510:1-5.

In addition to hiring decisions, Eulen America places much weight on carrier recommendation for promotional decisions too. Resp. Ex. 8; Tr. 510:22-25. For example, a Eulen America FLL station employee, Mr. Brian Bolt, who is assigned to the Bahamasair account, was promoted from a ramp agent to a supervisory ramp position due to input from the Bahamasair assistant manager familiar with Mr. Bolt's work performance. Tr. 511. Ms. Kendrick testified that Bahamasair was very pleased with his performance and when it was time to fill the supervisory position, the pertinent Bahamasair employees all agreed that Mr. Bolt would be their choice for the position. Tr. 559. To effectuate his promotion, Ms. Kendrick completed a Payroll Status Change Form which reflected his new supervisory position, identified as "ramp lead & QC," and the associated pay raise as a result. Resp. Ex. 8.

Further, the evidence sets forth examples of significant influence over termination decisions sufficient to establish carrier control. *See ABM-Onsite Services*, 45 NMB 27, 36 (2008) (RLA jurisdiction was established and the NMB found in part that following an altercation the carrier asked the employer to simply "take action" and the employee was terminated). It is imperative to reestablish here the ALJ's explicit findings which undoubtedly proves a direct relationship between the carrier complaint and subsequent personnel action. ALJ pg. 6 ¶ 34-46; 7 ¶ 1-5. To exemplify, the ALJ stated in his Decision the following:

Respondents' Exhibit 3 reflects a number of carrier complaints. As a result, Kendrick terminated one employee for tardiness and two supervisors and an employee as a result of a WestJet investigation that concluded they had been stealing; offered to transfer two employees to jobs with other carrier (both voluntary

resigned); and issued an oral warning to one employee (there is no indication of whether he was transferred).

In at least two situations, Kendrick issued lesser discipline following a carrier complaint, and the employee was transferred to work for another airline. In the first, Bahamas complained about the rude behavior of counter agent Vasquez (mentioned above), as a result of which Oviedo issued him a written warning, and he was transferred to AA (GC Exh. 8).<sup>8</sup> Oviedo, write in the discipline that although the offense was grounds for termination, “[W]e believe on[sic] giving our employees a second opportunity,” and Kendrick testified that this sentiment was communicated to Vasquez in the meeting that she and Oviedo conducted with him. The following month, AA complained about Vasquez inappropriate behavior as a janitor, resulting in Kendrick suspending him until further investigation (R. Exh. 2). Ultimately, he was not terminated. In the second (see R. Exh. 11), Bahamas complained about the conduct of a bag room employee, who received a written warning and was transferred to WestJet cabin cleaning.

To add, the ALJ omitted pertinent facts associated with some of the above-mentioned “carrier complaints” which Eulen America believes is important to also articulate and clarify here. The ALJ begins his findings with Kendrick’s decision to terminate an employee as a result of a carrier’s complaint regarding an employee’s tardiness. ALJ pg. 6 ¶ 34-35. The ALJ’s finding is true. However, the carrier specifically explained to Kendrick that personnel action was the only way to remedy its concern. Resp. Ex. 3 pg. 1 of 10; Tr. 537:1-21. More specifically, Mr. Guillermo Salinas, who is a Bahamasair shift manager, directly called Kendrick upset about the performance of Eulen America bag room agent Willard Delancy. Tr. 537:1-21. He complained about his tardiness which caused Salinas to perform Delancy’s bag room tasks so Bahamasair would not incur delays. *Id.* Subsequently, Salinas contacted Kendrick and explained that an incident like this should not happen and the only way to remedy this occurrence, and future repeated instances, is if Delancy was immediately removed from the account. *Id.* Kendrick complied. *Id.* Not only did she remove Delancy from the Bahamasair account, but she also terminated his employment. *Id.*

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<sup>8</sup>GC Ex \_\_ refers to Counsel for the General Counsel exhibit number introduced into evidence in the above-captioned case.

Regarding the above-mentioned individuals terminated for stealing, WestJet was the entity that conducted the investigation. Resp. Ex. 3 pg. 6-8 of 10; Tr. 540-541. WestJet concluded that theft occurred, communicated its results with Ms. Kendrick, and requested the immediate removal of these individuals from its account. *Id.* Notably, there is no evidence in the record which proves that WestJet permitted Eulen America's involvement in the investigative process even though the allegations were towards Eulen America employees. Not only did Ms. Kendrick comply with WestJet's instructions to remove these individuals from the WestJet account, but she terminated their employment as well. *Id.* There termination forms substantiate the direct correlation between WestJet's investigation, its request for removal, and Ms. Kendrick's subsequent decision to terminate them. *Id.* There is no other articulated reason for why these individuals were terminated. All termination forms state in pertinent part, "WS [WestJet] our client during an audit investigation, concluded that our agents cash void transactions were high enough to request the removal of the above mentioned."<sup>9</sup> (emphasis added). *Id.*

Additionally, a company's decision to transfer or reassign an employee because of carrier complaints is relevant when determining carrier control. *See ABM-Onsite*, 45 NMB 27, 36 (RLA jurisdiction was established and the NMB found in part that PAC's general manager "requested reassignment of a dispatcher because of performance issues"). To add, the NMB in *Swissport USA, Inc.*, which employed the traditional standard, persuasively stated:

This case is also similar to *International Total Servs.*, 26 NMB 72 (1998). In that case, as here, the carriers did not control hiring or hiring employees. Nevertheless, the Board found the company subject to RLA jurisdiction based, in part, on the fact that carriers could request employee re-assignment and played a significant role in

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<sup>9</sup>Parenthetically, yet on a related basis, WestJet reserves the contractual right to require Eulen America to investigate baggage pilferage if WestJet determines a trend has occurred. *Jt. Ex.* 17 pg. 18 of 29. If Eulen America fails to engage in the investigation in compliance with WestJet's timelines, then WestJet, in its sole discretion, may conduct its own investigation with local law enforcement and the investigation could include the entire Eulen America employee base. *Id.*

staffing and other working conditions. *See also Quality Aircraft Serves.*, 24 NMB 286 (1997).

35 NMB 190, 196 (2008). As an initial matter, the ALJ correctly found that Ms. Kendrick offered to transfer unidentified employees because of carrier complaints. ALJ pg. 6 ¶ 34-46; 7 ¶ 1-5. Yet, it is imperative to clarify the ALJ use of the word “offer[.]” ALJ pg. 6 ¶ 36. Ms. Kendrick’s decision to reassign or transfer these respective employees was after the carrier’s specific request that these individuals either be removed or replaced from the account.

For instance, Mr. Rose, who is a Spirit Airlines manager, contacted Ms. Kendrick and emphatically explained to her that Ms. Ambeau, a Eulen America FLL station employee, was not properly performing her dispatching tasks which resulted in delays. Resp. Ex. 3 pg. 2 of 10; Tr. 223-224; 538:14-18. During their conversation, Mr. Rose requested that Ms. Kendrick replaces Ms. Ambeau and Ms. Kendrick complied with his request. Tr. 538:14-18. Ms. Kendrick’s intent was to reassign Ms. Ambeau to another position, but Ms. Ambeau refused and voluntarily resigned as a result. Resp. Ex. 3 pg. 2 of 10. Additionally, Ms. Lynn Kielniak, who is employed by WestJet as its regional director, explained to Ms. Kendrick that she was uncomfortable with an employee named Mr. Dwayne Perrin working WestJet’s account because he was not utilizing WestJet’s baggage service system correctly. Tr. 538:19-25; 539:1-16. As a result, Ms. Kielniak requested Ms. Kendrick to remove Mr. Perrin from the WestJet account at which point Ms. Kendrick terminated his employment. Tr. 565:17-25; 566:1.

Furthermore, the manager employed by Bahamasair and assigned to the FLL station, handwrote Ms. Kendrick a letter regarding the unprofessional behavior of a Eulen America FLL station employee named Ms. Alesia Greenway. Resp. Ex. 11 pg. 3 of 3. Ms. Kendrick testified that the Bahamasair manager wanted Ms. Kendrick to assure Ms. Greenway’s removal from her assignment. Tr. 529:4-13. Because of Ms. Kendrick’s conversation with the Bahamasair manager,

Ms. Kendrick met with Ms. Greenway, issued her a written warning, and subsequently reassigned Ms. Greenway to the WestJet account in conformity with Bahamasair's request. Resp. Ex. 11; Tr. 529. The ALJ states in this instance, and in his findings regarding Mr. Vasquez that Ms. Kendrick issued lesser discipline after the carriers complained, somehow implying that because the discipline was a lesser form of discipline, the existence of carrier control has disappeared. However, Eulen American asserts that it is not the type of discipline that is important to the analysis of control, but the simple fact that discipline was issued.

**vi. Exceptions # 1, 5, 7, 14, 36-38, 40-41, 44, 46-48, 53-57, 59-60, 62-63**  
***Carrier Influence on Scheduling and Staffing Requirements***

Moreover, carrier flight schedules which determine employee work schedules is sufficient evidence to establish carrier control. *See ABM-Onsite Services*, 45 NMB 27, 32 (2018) (RLA jurisdiction was established and the NMB stated in part that "the airlines members of PAC influence the schedules of ABM's operations"); *see also Swissport USA, Inc.*, 353 NLRB 145 (2008) (RLA jurisdiction was established and the NLRB found in part that employees assigned to the carriers based on carrier flight schedules); *see also Bradley Pacific Aviation, Inc.*, 350 NLRB 583 (RLA jurisdiction was established and the NLRB found in part that hours worked were determined by schedules and needs of the carrier); *Dobbs Int'l Services d/b/a Gate Gourmet*, 34 NMB 97 (2007) (RLA jurisdiction was established and the NMB found in part that the company generated its own schedules but schedules were determined by carrier schedules and when the carrier adjusted its schedules so did the company).

Ms. Kendrick testified that all schedules at the FLL station are dependent on the carriers' flight schedules. Tr. 513:7-13. In fact, carriers such as Spirit Airlines and Delta Airlines, have even commenced additional steps to assure that the Eulen America FLL station employees assigned to its account remain compliant with their flight schedules. In 2016, Spirit Airlines developed a

dispatcher system between it and Eulen America's FLL station personnel. Tr. 219:18-23; 220:6-7. In part, Spirit Airlines requested Eulen America to assign a Eulen America FLL station employee to remain in its operations office to conduct the dispatching responsibilities on behalf of Eulen America. Tr. 517. Notably, all other individuals working in the operations office are Spirit Airlines employees. Tr. 225:21-25; 226:1-4; 517.

The Eulen America FLL station dispatcher assigned to work in the Spirit Airlines operations office has access to Spirit Airlines McWeb system, which tracks the location of Spirit Airlines flights. Tr. 232. This system is not accessible to the public or other carriers. Tr. 232:10-25; 233:1-5. Rather, Spirit Airlines has provided Eulen America with its log-in credentials to permit the Eulen America dispatcher the ability to relay communications to Eulen America FLL station employees regarding the status of Spirit Airlines flights, whether such flights are on-time or delayed. Tr. 232-233. When the dispatcher logs-in to McWeb, the dispatcher reviews the pertinent flight information, and then determines whether the cabin cleaning agents must be dispatched to a respective Spirit Airlines gate to perform their cabin cleaning duties. Tr. 232-233. To reiterate here, the evidence proves that Delta Airlines evidently maintains similar intent regarding compliance with its flight schedules because it provided the cabin cleaning agents assigned to its account with information display monitors which communicate flight location and information to alert the agents upon the plane's arrival. Tr. 516:11-15; 556:6-20.

Moreover, employee work schedules must adjust when the carrier's schedules adjust too. For example, on December 13, 2016, Mr. Trevor Campbell, a Delta Airlines customer service representative, sent Ms. Kendrick an email title "Skd. Change Eff. Dec. 22-Jan. 06, 2017." Resp. Ex. 9. The purpose of the email was to inform Ms. Kendrick about the changes to Delta Airlines schedule between December 22, 2016 and January 6, 2017, and to assure Eulen America remained

compliant with its schedule modification. Resp. Ex. 9; Tr. 514:12-16. In response, Ms. Kendrick underwent the necessary steps to adjust employee schedules to remain compliant. Tr. 514:12-16. Ms. Kendrick manifested Delta Airlines communication through the chain of command to effectuate the request, which was also posted for reference as well. Tr. 569:14-20.

To add, Ms. Mavis Smith, who is employed by Bahamasair as the FLL station manager, sent Ms. Kendrick an email on November 21, 2016, which demanded adequate staffing and equipment due to peak season. Resp. Ex. 10; Tr. 518-520. Parenthetically, Bahamasair may request from Eulen America additional work labor and Bahamasair also retains the contractual prerogative to change schedules, which undoubtedly may affect Eulen America's operations and by extension employee schedules. Jt. Ex. 9 pg. 2 of 7.

In summarization, Ms. Smith's email explained to Ms. Kendrick that Bahamasair's flights were going to arrive at Terminal 4 and leave from Terminal 3 instead of arriving and leaving from Terminal 1. Tr. 519:18-25; 520:1-13. Such modification meant the planes were arriving at a section of the FLL station designated as a TSA post-clear, which would require TSA clearance at the FLL station as opposed to TSA pre-clear which meant clearance was already handled at the departed location. *Id.* The modification required Eulen America to double the number of employees assigned to the Bahamasair account and therefore Ms. Kendrick had to reshuffle schedules to accommodate Bahamasair's needs. *Id.*; Tr. 519:17-18; 520:3-7.

Further expressed in Ms. Smith's email is information regarding the arrival of a cargo flight which resulted in an additional out of scope assignment added to the Eulen America FLL station's Bahamasair schedule. Resp. Ex. 10; Tr. 520:22-25; 521-522:1. Due to the large influx of passenger luggage headed to the FLL station as a result of peak season, Bahamasair needed the cargo plane to accommodate its passengers. Tr. 521:1-8. Notably, the cargo plane had arrived to the FLL

station prior to the passenger plane, and as a result, Eulen America was the designated custodian for the luggage. Tr. 521:11-13. Furthermore, no permission was requested, Bahamasair merely notified Ms. Kendrick who executed Bahamasair's instructions. Tr. 521:23-25; 522:1.

Additionally, WestJet has set forth the specific number of employees and the specific times those employees should be performing their respective services. For example, WestJet requires a minimum of 4 passenger service agents at the check-in counters with debrief and setup completed 3 hours prior to scheduled departure time. Jt. Ex. 17 pg. 17 of 29. WestJet also requires that a dedicated supervisor be available for operations from 3 hours prior to scheduled departure to 1 hour after the WestJet flight is airborne. *Id.* Additionally, WestJet requires flight check-in to begin 3 hours prior to departure and the cut-off time for baggage check-in is approximately 60 minutes prior to departure. *Id.* Moreover, WestJet requires 1 agent to proceed to the arrival gate 45 minutes prior to the planes' arrival to act as the gate agent. *Id.* In addition, a minimum of 1 agent must remain at the gate for at least 30 minutes after the flight is airborne to assist with any duties related to the departure or arrival of the inbound flight, including but not limited to baggage claims. *Id.* To add, WestJet also requires at least 1 marshaller and 2 wing walkers to be available when its planes arrive or depart from the FLL station. *Id.*

Notably, WestJet reserves the right to request Eulen America to remove 1 or more of its employees from WestJet's operations if that employee is deemed to be working in an unsafe manner, without appropriate training, in a manner that is contrary to WestJet's policies and interests, or in any other delinquent manner. Jt. Ex. 17 pg. 18 of 29. *See ABM-Onsite Services*, 45 NMB 27, 31 (2018) (RLA jurisdiction was established and the NMB found in part that PAC reserved the right to request the removal of any ABM employee who does not comply with specified requirements). Furthermore, if WestJet determines that the Eulen America FLL station

fails to provide sufficient personnel which may cause delays, such shortage will be discussed with Eulen America and WestJet reserves the right to request that the service charge for flights affected be waived when proper personnel levels are not met. *Id.* Additionally, the record is replete with various contracts that requires Eulen America to maintain a supervisor who oversees all services provided and requires the supervisor to be available so he or she may continuously update the carrier. Jt. Ex. 10 pg. 4 of 80 (Delta Airlines); Jt. Ex. 15 pg. 5 of 10 (Spirit Airlines); Jt. Ex. 6 pg. 18 of 24 (American Airlines).

Regarding Spirit Airlines, it has set forth a benchmark of 53 flights per day, averaged over a week in which Eulen America FLL station employees assigned to its account must service. Jt. Ex. 15 pg. 2 of 10. Notably, Spirit Airlines requires the Eulen America FLL station to adjust staffing levels, whether such adjustment increases or decreases the levels, provided daily flight volume fluctuates. *Id.* Regarding American Airlines, it requires Eulen America to provide it with notice of any material staffing change and Eulen America may not materially change the composition of its employees without the prior written consent of the American Airlines general manager. (Jt. Ex. 6 pg. 18 of 24). *See ABM-Onsite Services*, 45 NMB 27, 31 (2018) (RLA jurisdiction was established and the NMB found in part that “ABM cannot replace ‘Key Personnel’ without written consent”). American Airlines even reserves the right to dictate how Eulen America records the start and end times of shifts actually worked in accordance with any procedure specified by American Airlines. *Id.* Like WestJet above, American Airlines also reserves the right to request Eulen America remove any of its employees from its account who in the opinion of the American Airlines general manager, has engaged in any improper conduct or is not adequately qualified to perform the American Airlines services to the satisfaction of the American Airlines general manager. Jt. Ex. 6 pg. 19 of 24.

## **CONCLUSION**

The carriers at the FLL station exert a significant degree of influence over all aspects of Eulen America's operations and employees. For the foregoing reasons and authorities cite above, the complaint should be dismissed for lack of jurisdiction. Alternatively, in conformity with the NLRB's traditional approach, Eulen America respectfully requests the NLRB seek an advisory opinion from the NMB as to whether Eulen America is subject to the jurisdiction of the RLA.

*/s/ Brian Koji*

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## **CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY**, that in addition to filing the foregoing with the Board's e-Filing System, a true and correct copy of the foregoing has been furnished via email on this 29<sup>th</sup> day of May 2018 to:

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